No. _____

In the Supreme Court of the United States
October Term 1968

VALLEYDALE PACKERS, INC., OF BRISTOL,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE V. GARDNER
ASA AMBRISTER
1341 G. Street, N. W.
Washington, D. C.
Counsel for Petitioner

GEORGE V. GARDNER
Counsel of Record
1341 G. Street, N.W.
Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Valleydale Packers, Inc., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 29, 1968.

OPINION BELOW

The opinion below by the United States Court of Appeals for the Fifth Circuit is unreported and a certified copy of such opinion is appended to this petition as Appendix A hereto. In addition, the opinion of the National Labor Relations Board, the administrative agency in the case, is appended to this petition as Appendix D hereto.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 29, 1968, and is appended to this petition (infra, Appendix B). In addition, a Petition for Rehearing was denied by the said Court of Appeals on February 26, 1969 (infra, Appendix C).

QUESTION PRESENTED

Does a pre-existing collective bargaining agreement, made over one year previously and the terms of which are found to be not binding on a successor employer, nevertheless establish that a union which was not certified under Section 9 of the National Labor Relations Act possessed majority status at the time a successor employer assumed control of a business.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*); the relevant provisions of which are as follows:

> "Sec. 8(a) It shall be an unfair labor practice for an employer—"
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."
>
> (29 U.S.C. Sec. 158(a)(5))

* * *

> REPRESENTATIVES AND ELECTIONS
>
> "Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

* * *

> "Sec. 10(e) The Board shall have power to petition any court of appeals in the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdic-

tion of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(29 U.S.C. Sec. 159(a), 160(e))

STATEMENT

The Court below found (and such is accepted as fact in this petition) that the Petitioner herein, Valleydale Packers, Inc., became a successor employer when it purchased a meat processing plant in Miami, Florida, from Tobin Packing Company.

At the time of the purchase of the business herein by Petitioner Valleydale Packers, Inc., there was in existence a collective bargaining agreement between Meat Cutters, Packing House Workers & Food Handlers, District Union No. 657, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (herein called the union) and the predecessor employer Tobin Packing Company, who approximately two years previously had recognized the union as exclusive bargaining representative for its unit employees. This recognition was extended by virtue of a card check and, therefore, the union was not a certified union under Section 9 of the National Labor Relations Act.

The Court below found that the pre-existing labor agreement, even though not binding on Petitioner Valleydale, nevertheless established the union's majority at the time of the business transfer. On the basis of such finding of majority status the Court below found that Petitioner Valleydale failed to bargain with the union in good faith in violation of Section 8(a)(5) of the National Labor Relations Act.

REASON FOR GRANTING WRIT

There is no evidence, nor are there any presumptions, on which the union's majority at the time of the business transfer involved herein can be established. Since proof of majority status is a condition precedent to a refusal to bargain finding under Section 8(a)(5) of the National Labor Relations Act (*United Mine Workers of America* vs. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 69), it is submitted there has been a failure of proof on this necessary point.

CONCLUSION

For the foregoing reason Petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE V. GARDNER
ASA AMBRISTER
Counsel for Petitioner

GEORGE V. GARDNER
520 Colorado Building
1341 G Street, N.W.
Washington, D. C. 20005
May, 1969

APPENDIX A

OPINION OF THE COURT BELOW

Decision of the United States Court of Appeals
For the Fifth Circuit in No. 25,584

Decided November 7, 1968

Before: BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

PER CURIAM: In this Labor Board proceeding the Board found that (1) the meat cutters union was the exclusive bargaining representative of certain of the Tobin Packing Company's employees; (2) that Valleydale was a "successor" to TPC; and (3) that Valleydale had violated the act by refusing to bargain with the union and by unilaterally changing the terms and conditions of employment of the company's employees represented by the union.

Responding to appellee's first contention, we conclude that the Board's finding that Valleydale was a successor employer to its predecessor is supported by substantial evidence. The crucial question for determining successorship is one of continuity—whether the industry remains essentially the same after the transfer of ownership. See *NLRB v. Tempest Shirt Mfg. Co.* (5 Cir., 1960), 285 F2d 1, and *NLRB v. Auto Ventshade, Inc.* (5 Cir., 1960), 276 F. 2d 303.

We also conclude that the Board had an adequate basis for finding that the successor-employer did not establish that it had a good faith doubt of the union's

majority status. The mere fact that the collective bargaining agreement between the union and the predecessor did not, of itself bind the successor, does not prevent the Board's considering the existence of this collective bargaining agreement, entered into following a card check of members of the union by the predecessor corporation, as adequate proof of the existence of the union's majority status and the absence of any good faith doubt by the respondent; this is especially true in the absence of any proof of facts that would show that the union no longer represented a majority of the workers, other than some turn-over in employment.

As to the respondent's contention that the order is too broad, we find no specific point which is called to our attention by respondent as to the manner in which it thinks the order should be modified. With the broad authority granted to the Board to fashion an order, we do not, under these circumstances, consider it appropriate to require the entry of what respondent calls the "usual 8(a)(5) bargaining order."

The order will be ENFORCED.

APPENDIX B

JUDGMENT OF THE COURT BELOW

Order Filed November 29, 1968
In No. 25,584 in the United States Court of Appeals
For the Fifth Circuit

Before: BROWN, Chief Judge, TUTTLE, Circuit Judge, and FISHER, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent, Valleydale Packers, Inc., of Bristol, its officers, agents, successors, and assigns on February 7, 1967. The Court heard argument of respective counsel on September 30, 1968, and has considered the briefs and transcript of record filed in this cause. On November 7, 1968, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Valleydale Packers, Inc., of Bristol, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

APPENDIX C

JUDGMENT ON THE PETITION FOR REHEARING

Order Filed February 26, 1969
In No. 25, 584 in the United States Court of Appeals
For the Fifth Circuit

(February 26, 1969)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, TUTTLE, Circuit Judge and FISHER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX D

OPINION AND JUDGMENT OF THE ADMINISTRATIVE AGENCY INVOLVED

Decision and Order
Of the National Labor Relations Board
In Case No. 12-CA-3125

On December 15, 1965, Trial Examiner Robert L. Piper issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision.[1] Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications and additions.[2]

---

[1] The Trial Examiner did not decide whether the Respondent was bound by its predecessor's collective-bargaining agreement with the Union; he referred that issue directly to the Board. The Board is of the opinion that in view of the agreement's expiration date of March 6, 1967, and the Board's affirmative bargaining order herein, no useful purpose would be served in determining the Respondent's liabilities, if any, under its predecessor's collective-bargaining agreement in this case.

[2] We find, in agreement with the Trial Examiner, that Respondent's unilateral changes were violations of the Act. In addition, we find that these changes might have resulted in financial loss to the employees for which they should be reimbursed in accordance with *F. W. Woolworth*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Valleydale Packers, Inc., of Bristol, Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following paragraphs 2(b) and 2(c) to the Trial Examiner's Recommended Order, relettering paragraphs 2(b) and 2(c) as new paragraphs 2(d) and 2(e):

"(b) Make employees whole for any loss of pay or other benefits they may have suffered as a result of the unilateral changes in working conditions subsequent to January 18, 1965."

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records relevant or necessary to facilitate a determination of whatever payments may be required to make employees whole."

2. Add the following paragraph before the last full paragraph of the notice attached to the Trial Examiner's Decision:

WE WILL make our employees whole for any loss

of pay or other benefits they may have suffered as a result of our unilateral changes in working conditions subsequent to January 18, 1965.

Dated, Washington, D. C. Feb. 7, 1967

FRANK W. MCCULLOCH, *Chairman*

JOHN H. FANNING, *Member*

GERALD A. BROWN, *Member*

HOWARD JENKINS, JR., *Member*

SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding under Section 10(b) of the National Labor Relations Act was heard at Miami, Florida, on July 12 and 13, 1965, pursuant to due notice. The complaint, which was issued on May 26, 1965, on a charge dated January 18, 1965, as amended May 24, 1965, alleged in substance that Valleydale Packers, Inc. of Bristol [1] (hereinafter Respondent), engaged in unfair labor practices proscribed by Section 8(a)(5) and (1) of the Act by refusing to bargain with Meat Cutters, Packing House Workers & Food Handlers, District Union No. 657, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,[1] (hereinafter the Union), by (1) refusing to recognize, meet, or negotiate with the Union, (2) unilaterally changing the terms and conditions of employment of the em-

[1] The parties stipulated these to be the correct names of Respondent and the Union, rather than those found in the caption of the pleadings.

ployees represented by the Union, (3) refusing to give force and effect to the collective-bargaining agreement between the Union and Respondent's predecessor, and (4) refusing to negotiate with the Union pursuant to the wage reopening provision contained therein. Respondent's answer denied the alleged unfair labor practices. Both parties filed proposed findings and briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. Jurisdictional findings

Respondent a Virginia corporation licensed to do business in the State of Florida, is engaged in the manufacture and wholesale distribution of meat and related products. It annually purchases and receives goods, supplies and materials valued in excess of $50,000 directly from out-of-state suppliers. Since January 18, 1965,[2] Respondent has maintained an office, plant and place of business at Miami, Florida, where it has purchased and received goods and material shipped to this location directly from points, outside the State of Florida. Projected on an annual basis, the value of such extrastate purchases will exceed $50,000. Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

[2] All dates hereinafter refer to 1965 unless otherwise indicated.

A. INTRODUCTION AND ISSUES

The issues herein are (1) whether Respondent is a "successor employer" within the meaning of the decisional law, and, as such, required to bargain with the Union as the exclusive representative of its employees, formerly employees of Tobin Packing Co., Inc., Respondent's predecessor; (2) whether Respondent, as such successor employer, refused to bargain with the Union by unilaterally changing the terms and conditions of employment of such employees; (3) whether Respondent, as such successor employer, is bound by the terms of the collective-bargaining agreement entered into between the Union and Tobin; and (4) whether Respondent, as such successor employer, refused to bargain with the Union by refusing to negotiate with it pursuant to the wage reopening provision contained in said contract. Respondent, denying that it is a successor employer within the meaning of the decisional law, admitted that it refused to recognize or bargain with the Union as the exclusive representative of its employees, admitted that it refused to give force and effect to the collective-bargaining contract between the Union and Tobin, including the wage reopening provision contained therein, and denied that it refused to bargain by unilaterally changing the terms and conditions of employment of the employees in the alleged appropriate unit. Respondent, assuming *arguendo* it is bound by the terms of the collective-bargaining contract, further contends that there was no refusal to bargain with respect to the wage reopening provision therein because the Union failed to give the notice required thereunder.

B. REFUSAL TO BARGAIN

The facts are substantially undisputed, Respondent having called no witnesses and offered no proof other

than its cross-examination of the witnesses called by the General Counsel. On January 18, Respondent, by means of real and personal property leases described more fully hereinafter, acquired from Tobin the office, plant and place of business where Tobin had been engaged in the manufacture and wholesale distribution of meat and related products in Miami, Florida since October 1962. On December 5, 1963, Tobin recognized the Union as the exclusive representative of its employees in the appropriate unit described below as the result of a card check conducted by an independent third party arbitrator. Of 56 *eligible* employees, 31 selected the Union as their representative. Tobin and the Union then stipulated, the complaint herein alleges, and I find that the following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

All maintenance, production and processing employees, including drivers and shippers, but excluding all salesmen, office and clerical employees, executives, guards and supervisors as defined in the Act.

On May 7, 1964, Tobin and the Union entered into a collective-bargaining agreement, with wage provisions retroactive to March 2, 1964, for a term of 3 years expiring March 6, 1967. This agreement was in full force and effect at the time of the transfer to Respondent on January 18. It contained provisions recognizing the Union as the exclusive representative of the employees in the appropriate unit and covering wages, union dues checkoff, grievances, arbitration and other matters common to such contracts. It contained no provision making it binding upon successors and assigns. It is undisputed that Respondent did not assume this contract. Although the contract was to run until March 6, 1967, it contained a wage reopening provision

permitting the parties to reopen negotiations for wages only on March 1, 1965 by giving sixty days notice of such intention. During November and December, 1964, Gerald Greenfield, president of the Union, and Al St. Germaine, its business representative, orally notified John M. Watson, vice president and general manager of the Miami division of Tobin, that the Union desired, pursuant to the contract, negotiations for wages to be effective March 1, 1965. This occurred during a discussion between Tobin and the Union of various merit and progressive wage increases under the contract. Watson suggested that they defer such matters temporarily in view of the fact that the parties were planning to negotiate new wages under the reopening provision in a short time. Early in January Watson agreed that the parties ought to meet as soon as possible so that any agreement reached would be effective as of March 1.

Sometime during January or earlier, Tobin decided to cease operating in Miami and to try to sell or lease its plant and equipment. As a result, negotiations occurred between Tobin and Respondent. *Theses* facts were not known by the Union. On January 12, Greenfield wrote Watson a letter confirming Greenfield's and St. Geramine's prior conversations with Watson concerning the proposed general wage increases as of March 1, pursuant to the contract, and suggesting that they should fix an early date to meet inasmuch as the negotiations might take some time. On January 13, between 4 and 5 p.m., pursuant to orders from their supervisors, substantially all of Tobin's employees assembled at a meeting in the plant lunchroom. Watson presided. He told the employees that Tobin was turning the business over to Valleydale and introduced the new plant superintendent, F. Goodrich Wright. Wright told the employees that everything would be the same,

all of them would be retained and nothing would be changed except that Valleydale, which operated seven or eight other plants, would take over the firm on January 18, the following Monday morning. However he advised the employees that they would lose their seniority, they would be considered new employees and be required to fill out an application for employment, take a physical examination and be interviewed by him personally, there would be no paid vacations, there would be no wage increases until the firm showed an increase in profits, and they should submit any grievances or complaints to him or their foreman.

Sometime on January 13 or 14, St. Germaine learned from one of the employees of the proposed change in management and in turn informed Greenfield. Greenfield called Watson on either January 13 or 14 and asked him about it. Watson told Greenfield that there had been some talks but that nothing had been consumated and he expected to hear shortly from Tobin's management whether a deal had been completed. Greenfield called Watson again on the 15th. Watson then confirmed that a deal had been made and said that while it was not yet official Respondent would take over the operations on Monday morning, January 18. On Monday morning, January 18, Greenfield wrote Respondent at Tobin's Miami address (then Respondent's address), advising it that the Union was the exclusive representative of the employees, that it had an existing collective-bargaining contract with Tobin, and complaining about Wright telling the employees on January 13 that their terms and conditions of employment would be changed when Respondent took over the plant. The letter further requested recognition, compliance by Respondent with the terms of the collective-bargaining agreement, and that Respondent commence

negotiations with the Union under the wage reopening provision pursuant to the notice given to Watson. Greenfield enclosed a copy of the contract and his letter of January 12 to Watson.

The contractual arrangements between Tobin and Respondent consisted of a real property sublease and a personal property lease. Tobin had leased the premises from its third party owners, and with their written consent subleased the premises to Respondent for a substantial period of time, with an option to extend the number of years three times the original period. In addition, Tobin leased to Respondent for a like period of time all of the equipment, machinery and personal property used in the operation of the business, with an option to purchase crediting the payments under the lease to the purchase price. While both leases were dated January 18, the consent to sublease was executed on or before December 31, 1964, and accepted by Tobin and Respondent on December 31, 1964, and January 4, respectively.

On Monday morning, January 18, Respondent took over the operation of the entire plant. The record establishes that there was substantially no change in personnel within the appropriate unit or in any of the other personnel, including the salesmen, supervisors, and office and clerical help, other than the fact that Wright replaced Watson in charge of the plant. The duties and wages of the employees and their various supervisors remained unchanged. Respondent continued to produce the same products in the same way in the same plant with the same equipment. Respondent continued to service and sell the same customers as Tobin. In fact Respondent continued to market its products under the Tobin label for approximately 5 months after the transfer. In all essential respects the operation

remained exactly the same. In sum, there was no change in product, plant, location, equipment, personnel, wages, customers, supervision, method of operation, method of delivery, maintenance, uniforms, and even labels. As predicted by Watson and Wright to the employees, everything remained the same except that Respondent replaced Tobin and Wright replaced Watson.

After Respondent took over the operation on January 18, it did not deduct the union dues of the employees who were members of the Union, as provided in the checkoff provision of the contract between the Union and Tobin. None of the employees advised Respondent to discontinue deducting such dues. None of the employees instructed Respondent to continue deducting such dues. No actual changes in the employees' terms and conditions of employment were made until about a week or 10 days later. In fact some of the employees, apparently those who missed the meeting on January 13, when they came to work on January 18 were unaware that they had a different employer and learned of it later as a result of gossip in the plant. About a week or 10 days after January 18, the employees were required to fill out applications for employment and take a physical examination. About a week thereafter, each employee was interviewed individually by Wright. At this time they were required to sign a form providing that they would be probationary employees for 180 days and a set of work rules changing the terms and conditions of employment.

Because Greenfield received no reply to his letter of January 18 to Respondent requesting recognition and compliance with the contract, on January 25 he and St. Germaine went to the plant to see Wright. Wright refused to meet with them in his office but told them in

the reception lobby that he could not discuss the matter, it was out of his hands and had been referred to Respondent's attorney who would reply to Greenfield's letter. Wright admitted receiving the letter and turning it over to Respondent's officials. On February 22, more than a month after Greenfield letter, counsel for Respondent replied that Respondent refused to abide by the contract between the Union and Tobin, refused to recognize the Union, doubted that the Union represented a majority of the employees, and suggested that the Union seek a Board election after giving Respondent an opportunity to see if it could establish a profitable business in Miami.

C. CONCLUDING FINDINGS

1. SUCCESSOR EMPLOYER AND DUTY TO BARGAIN

The record establishes beyond doubt that Respondent was a "successor employer" within the meaning of the decisional law. The crucial question in such determinations is whether the employing industry remains essentially the same after a transfer.[3] Unlike most of the reported cases where there were some differences in the employing industry after the transfer, here the employing industry or successor remained exactly the same, with the exception only of a change in the top management official. Respondent contends that because this transfer did not involve a sale or merger of the business, Respondent purchased no accounts receivable, customer lists or good will, Respondent assumed no obligations to its predecessor, and the transfer was

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[3] *N.L.R.B. v. Downtown Bakery*, 330 F. 2d 921 (6th Cir. 1964); *N.L.R.B. v. McFarland*, 306 F. 2d 219 (10th Cir. 1962); *N.L.R.B. v Auto Ventshade, Inc.*, 276 F. 2d 303 (5th Cir. 1960); *N.L.R.B. v. Lunder Shoe Co.*, 211 F. 2d 284 (1st Cir. 1954); *N.L.R.B. v. Armato*, 199 F. 2d 800 (7th Cir. 1952); *Burlington Rebuilders*, 149 NLRB No. 75 (1964); *Consolidated American Services, Inc.*, 148 NLRB 1521 (1964); *Maitenance, Inc.*, 148 NLRB 1299 (1964); *Johnson Ready Mix Co.*, 142 NLRB 437 (1963); *Cruse Motors, Inc.*, 105 NLRB 242 (1953).

effected by means of a real property lease and a lease of equipment and personal property with an option to purchase, it is not a successor employer within the meaning of the decisions. It is not the form of transfer which controls but whether or not the employing industry remained essentially the same. Several of the reported cases involved leases rather than sales.[4]

It is well established that such a successor employer is obligated to bargain with a union which is the exclusive representative of the employees acquired from the predecessor, absent a reasonable and good-faith doubt that such union represents a majority of the employees.[5] This is so whether such representative status is evidenced by a Board certification or by recognition and the existence of a collective-bargaining contract. Where a union has been certified by the Board, a conclusive presumption exists for one year, and a continuing presumption thereafter that such union is the exclusive representative of the employees, subject to rebuttal only by a showing of reasonable and good-faith doubt as to such status.[6]

While most of the reported decisions deal with a situation where the union has previously been certified,[7] it is equally well settled that a successor employer is required to bargain with a union whose majority status is evidenced by a collective-bargaining contract, and that in such circumstances a continuing presumption that the Union represents a majority likewise exists.[8] Where an employer has granted recognition and en-

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[4] *N.L.R.B. v. Armato; N.L.R.B. v. Lunder Shoe Co., supra*, n. 3.
[5] Note 3, supra.
[6] *Ray Brooks v. N.L.R.B.*, 348, U.S. 96 (1954).
[7] Note 3, *supra*.
[8] *N.L.R.B. v. Progressive Mine Workers*, 319 F. 2d 428 (7th Cir. 1963), aff'd., 375 U.S. 396 (1964); *N.L.R.B. v. Auto Ventshade*, Inc., 276 F. 2d 303 (5th Cir. 1960); *Chemrock Corporation*, 151 NLRB No. 111 (1965); *Burlington Rebuilders*, 149 NLRB No. 75 (1964); and *Rohlick*, 145 NLRB 1236 (1964).

tered into a collective-bargaining contract with a union, its majority status has been recognized. Because an employer is forbidden by law to recognize a union unless it represents a majority of his employees, it is presumed that such employer acted pursuant to law and that the union did in fact represent a majority of the employees, which presumption continues during the life of the contract.[9] Thus, although a majority of the employees had withdrawn from the union more than one year after certification, an employer was found to have refused to bargain by withdrawing recognition from the union during the term of the contract.[10]

Even if majority status as the result of a collective-bargaining agreement be considered a rebuttable presumption, as in the case of a certification more than one year old, there is not a scintilla of evidence that Respondent had any reasonable or good faith doubt that the Union represented a majority of its employees, other than Respondent's self-serving declaration on February 22 when it refused to recognize or bargain with the Union. Upon receipt of Greenfield's letter of January 18 enclosing the collective bargaining contract with Tobin, if not before, Respondent knew that the Union had such a contract with its predecessor, that it was still in full force and effect with more than a year to run, that it included a checkoff provision of the dues of the union members, and that the Union had advised Respondent that the Union was the exclusive representative of the employees. Thereafter Respondent, as it admitted, refused to recognize and bargain with the Union. Accordingly it is concluded and found that Re-

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[9] *Shamrock Dairy, Inc.*, 119 NLRB 998 (1957).

[10] *Hexton Furniture*, 111 NLRB 342 (1955); see also, *Roman Stone*, 153 NLRB No. 58, n. 3 (1965).

spondent by refusing to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

2. UNILATERAL CHANGES IN TERMS AND CONDITIONS OF EMPLOYMENT

As hereinabove found, Wright advised the employees on January 13 and later that when Respondent took over the plant they would be considered new probationary employees and lose their seniority rights, there would be no paid vacations, there would be no wage increases until the business showed a profit, and they were to submit their grievances to him or their foremen. All of these actions constituted changes in the terms and conditions of employment set forth in the collective bargaining contract. Respondent contends that there is no evidence that it or Wright knew of the existence of the Union in the plant or the contract on January 13. Although there is no direct evidence that on January 13 Respondent knew that the Union represented the employees or had a contract with Tobin, on cross examination one of the employees testified that he did not tell Wright that day that he belonged to the Union because he assumed that Wright knew this, inasmuch as a notice of a union meeting was posted in the plant that day. It strains credulity to believe that Respondent, taking over the question of the entire plant from Tobin, was unaware of the status of the Union or Tobin's contract with it. As Respondent's brief states: "A prospective purchaser or merger candidate would invariably have investigated the seller's records and files and would have had opportunity to discover an existing labor agreement or at least the checkoff provision through the payroll journal."

In any event, Respondent's knowledge on January 13 makes no real difference because Respondent did not.

put into effect any unilateral changes in working conditions until approximately a week or two later, after the receipt of the letter from Greenfield advising Respondent of the status of the Union and its contract. The employees were not required to fill out their applications for employment, or sign their probationary employment forms and the new work rules pursuant to interviews with Wright, until a week or more after Respondent took over the plant and had received the letter from the Union. The speech of January 13 did not constitute the act of changing the terms and conditions of employment but it was a statement of what Respondent intended to do after it took over the operations. Even if Respondent had taken such action on January 13, which obviously it could not have because Tobin was still operating the plant, the Board has recently held that such unilateral action by a successor employer with respect to applicants for employment constitutes a refusal to bargain and such applicants for employment, under principles well established by the Supreme Court, are employees within the meaning of the Act.[11]

Assuming such unilateral changes were put into effect on January 18 prior to the receipt of this letter, after its receipt Respondent continued them in full force and effect, thereby adopting and confirming such unilateral changes in the terms and conditions of employment after it knew that the Union represented the employees and had a collective bargaining contract with its predecessor. There can be no question that Respondent knew that the Union represented the employees and had a collective bargaining contract when Respondent made or confirmed the unilateral changes in the terms and conditions of employment. It is well set-

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[11] *Chemrock Corporation*, 151 NLRB No. 111 (1965).

tled that a successor employer violates the duty to bargain when it makes changes in the terms and conditions of employment without consulting, notifying or bargaining with the exclusive representative of its employees.[12] Accordingly, it is concluded and found that Respondent, by unilaterally changing the terms and conditions of employment, including seniority, vacations, grievance procedures and wages, refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

3. THE COLLECTIVE BARGAINING AGREEMENT

In addition to the refusals to bargain by refusing to recognize, meet or negotiate with the Union and by making unilateral changes in the terms and conditions of employment, the complaint also alleged that Respondent refused to bargain by refusing to give effect to the collective bargaining agreement between the Union and Tobin. The General Counsel contends that Respondent as a successor employer is bound by the terms of the contract. It is undisputed that Respondent did not assume the collective bargaining contract. While there are several Board decisions to the effect that a successor is not bound by the terms of a collective bargaining contract which it has not agreed to assume,[13] the General Counsel bases his contention upon the more recent decision of the Supreme Court in the *Wiley* case,[14] and the subsequent interpretations of that opinion by the Court of Appeals in the *Wackenhut* and *Reliance* cases.[15]

In the light of the holding of the Supreme Court in

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[12] *N.L.R.B. v. Armato, supra*, note 3; *Chemrock Corporation, supra*, note 12.

[13] *General Extrusion Company*, 121 NLRB 1165 (1958; *Rohlick*, 145 NLRB 1236, n. 15 (1964).

[14] *Wiley v. Livingston*, 376 U.S. 543 (1964).

[15] *Wackenhut Corporation v. Plant Guards*, 332 F. 2d 594 (9th Cir. 1964); and *Steelworkers v. Reliance*, 335 F. 2d 891 (3rd Cir. 1964).

Wiley, the position of the General Counsel appears to have considerable merit. The Court there found that a successor employer was bound by the arbitration provisions of a collective bargaining contract, when the union brought suit for arbitration of a number of the substantial provisions in the contract, including seniority rights, contributions to pension funds and security plans, job security and grievance procedures, severance pay, and vacation pay, even though the successor employer had not assumed the contract, there was no successors and assigns clause, and the union did not claim to represent a majority of the successor's employees because by merger the unit had been consolidated with a much larger unit which was not represented by a union. The Court said:

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate . . . the collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.' . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact, dictated both by circumstances, . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed."

Thus the General Counsel contends, where as here the successor employer is obligated to bargain with the union as the continuing representative of a majority of its employees, the facts are stronger to support a holding that the successor employer is bound by the contract. The Board has noted in two recent decisions that the decision in *Wiley* raises a question concerning the Board's prior rulings that a contract is not binding upon a successor employer unless it has assumed it. However, because of other controlling facts, the Board was not required to, and did not, pass upon the question.[16] In the *Triumph Sales* case, the Board found that Triumph was not a successor employer and hence stated: "We therefore find it necessary to reexamine at the present time the *General Extrusion* rule in the light of the *Wiley v. Livingston* decision."[17] The contract between Tobin and the Union contained a provision for arbitration substantially the same as that construed in the *Wiley*, *Wackenhut* and *Reliance* decisions.

However, the two decisions of the Courts of Appeals differ in their construction of *Wiley*. In *Wackenhut*,[18] the Court of Appeals for the 9th Circuit, in a suit under Section 301 of the Act for specific performance of an arbitration provision of a collective bargaining agreement not assumed by the successor employer, as in *Wiley*, held that the policy of the national labor laws obligated Wackenhut, the successor employer, to honor the collective bargaining agreement entered into by its predecessor. The Court, holding that this conclusion was required by the decision of the Supreme Court in *Wiley*, stated: ". . . where there is a substantial similarity of operation and continuity of identity of the busi-

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[16] *Chemrock Corporation*, 151 NLRB No. 111 (1965); *Triumph Sales, Inc.*, 154 NLRB No. 71 (1965).
[17] *Triumph Sales, Inc.*, 154 NLRB No. 71, n. 12 (1965).
[18] Note 15, *supra*.

ness enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer." In *Reliance*,[19] the Court of Appeals for the 3rd *Circuit*, also in a suit under Section 301 for specific performance of an arbitration provision of a collective bargaining contract not assumed by the successor employer, held that the successor, while obligated to arbitrate under the contract in view of the decision in *Wiley*, was not necessarily bound by the terms of the contract itself. The Court felt that the arbitrator, because of new circumstances created by the transfer of ownership, could reach results at variance with the terms of the contract. The Court stated: "The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract."

While the position of the Genral Counsel appears to have considerable merit, in view of the prior holdings of the Board and the differing views of the import of *Wiley* by the two Court of Appeals, discussed above, it would appear appropriate to defer such a conclusion to the discretion of the Board. Accordingly, no finding is made herein that Respondent refused to bargain with the Union in violation of the Act by refusing to give force and effect to collective bargaining agreement between the Union and Tobin.

4. THE WAGE REOPENING PROVISION IN THE CONTRACT

The complaint alleged that Respondent also refused to bargain with the Union by refusing to meet and

[19] Note 15, *supra*.

negotiate with it under the wage reopening provision contained in the contract. While the above disposition of the allegation that the refusal to abide by the contract was a refusal to bargain also disposes of this allegation, Respondent has further contended, assuming *arguendo* that it is bound by the collective bargaining contract, that the Union did not give adequate notice to Tobin under the applicable section of the contract. This of course amounts to a contention that Tobin would not have been required to negotiate under the wage reopening provision because of lack of proper notice and that therefore Respondent as the successor employer would not be either. In view of the fact that the Board may agree with the General Counsel in his interpretation of the import of the *Wiley* decision, it seems appropriate to dispose of this issue which was fully litigated in this proceeding. Section 20 of the contract between the Union and Tobin, entitled "Wage Reopening and Termination," contained the following provision: "However, this agreement is subject to negotiations for wages only on March 1, 1965 and again on February 28, 1966 by giving the usual sixty (60) days notice of intention to negotiate a new wage agreement."

As found hereinabove, the Union through St. Germaine and Greenfield gave Watson, Tobin's vice president, oral notice more than 60 days prior to March 1 of the Union's intention to reopen the contract for wage negotiations under this provision. Respondent contends that the notice must be in writing, based upon the preceding provision in Section 20 dealing with reopening at the time of expiration of the contract. That provision reads: "This Agreement may be reopened sixty (60) days prior to expiration by giving notice in writing prior to such termination and in accord with usual

National Labor Relations Board procedure." Because this notice was required to be in writing, Respondent contends that the phrase "usual sixty (60) days notice" for reopening wage negotiations also required such notice to be in writing. The Union on the other hand takes the position that oral notice was adequate since the provision did not state that the notice must be in writing.

In this connection of course Respondent's position must be that of Tobin. It is clear from the record that Tobin was satisfied that it had adequate notice from the Union with respect to the wage reopening provision. In the oral discussions between Greenfield and Watson, when various merit and progressive wage increases under the contract were under consideration, Watson suggested that the parties defer consideration of them until the wage reopening discussion which was about to commence and under which new wages would be effective March 1. Watson thus conceded that the oral notice he had been given by St. Germaine and Greenfield was adequate under the contract and agreed to negotiations with respect to the wage reopening thereunder. Greenfield's letter of January 12 to Watson referred to these prior conversations and was undisputed and unchallenged by Tobin. Inasmuch as the contract does not specify written notice in connection with wage reopening, more than 60 days oral notice was given, and Tobin accepted such notice and agreed to negotiate the wage reopening under the contract, it is concluded and found that the Union gave adequate notice of wage reopening under the contract.

Respondent also contends that if the contract is binding upon it, its refusal to negotiate under the wage reopening provision because of its contended lack of notice on the part of the Union should be the subject

of arbitration under the contract rather than a refusal to bargain under the Act. Respondent admittedly refused to meet and bargain with the Union under the wage reopening provision. Such refusal in effect amounted to a unilateral change in the terms and conditions of employment set forth in the contract, specifically the provision covering wage renegotiations. The Board has held that a refusal to abide by the terms of a collective bargaining contract, while a breach of contract, also constitutes a unilateral change in the terms and conditions of employment and thus violates Section 8(a)(5) of the Act.[20]

As hereinabove found, Respondent admitted that it refused to honor the contract or meet and negotiate with the Union under the wage reopening provision. Accordingly, a resolution of this allegation will depend upon the Board's determination of whether the contract is binding upon Respondent and no finding is here made that Respondent's refusal to meet and negotiate with the Union under the wage reopening provision constituted a refusal to bargain in violation of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and the Union is a labor organization, within the meaning of the Act.

2. All maintenance, production and processing employees, including drivers and shippers, but excluding all salesmen, office and clerical employees, executives, guards and supervisors as defined in the Act, constitute

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[20] *George E. Light Boat Storage, Inc.*, 153 NLRB No. 90 (1965).

a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. At all times on and after December 5, 1963, the Union has been and now is the exclusive representative for the purposes of collective bargaining of the employees in the above unit within the meaning of Section 9(a) of the Act.

4. By refusing to bargain with the Union on and after January 18, 1965, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it takes certain affirmative action of the type which is conventionally ordered in such cases as provided in the Recommended Order below, which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following:

RECOMMEND ORDER

Valleydale Packers, Inc., of Bristol, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union

as the exclusive representative of its employees in the appropriate unit found herein.

(b) Instituting changes in wages, seniority, vacation pay, grievance procedures or other terms and conditions of employment of its said employees without first notifying, consulting and bargaining with the Union concerning such changes.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Upon request, bargain collectively with the Union as exclusive representative of its employees in the appropriate unit found herein with respect to wages, hours, seniority, vacation pay, grievance procedures and all other terms and conditions of employment, and, if an understanding is reached, embody such in Miami, Florida, copies of the notice attached hereto marked "Appendix."[24] Copies of said notice to be furnished by the Regional Director for Region 12 shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by if for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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[24] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(c) Notify said Regional Director in writing within 20 days from date of receipt of this decision what steps Respondent has taken to comply herewith.[22]

Dated at Washington, D. C. December 15, 1965.

s/ ROBERT L. PIPER

ROBERT L. PIPER

Trial Examiner

[22] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."